The Polish Judiciary Reform: Problematic under European standards and a Challenge for Germany

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The latest efforts of the Polish government to reform the judiciary have met with fierce criticism both nationally and internationally. A new legislation concerning the National Council for the Judiciary has recently been introduced to the Polish Parliament, the *Sejm*, and awaits deliberation. The approach the Polish government has chosen is indeed problematic in the light of European standards for Councils for the Judiciary but so is the German model of selecting judges, which the Polish governments explicitly refers to as a point of reference for their reform. While the German and Polish situation are different for a number of reasons, the importance of selecting and appointing judges based on objective criteria rather than because of political affiliations must be of equal importance in both countries.

Article 186 (1) of the Polish Constitution stipulates: "*The National Council for the Judiciary shall safeguard the independence of courts and judges*". The Council's competences include the submission of requests to the President of the Republic for the appointment of judges to the Supreme Court, administrative courts, common courts and military courts (Art. 179 of the Constitution).

The Polish government has drafted an act that proposes major changes concerning the organization and composition of the Council. On this blog, these changes have been discussed and were convincingly identified as constitutionally questionable. The Draft Act also met with opposition from constitutional lawyers Polish judges and the MEDEL Association .

While we are in no position to assess the constitutionality of the Draft Act, we would like to examine the Draft Act in the light of European standards for Councils for the Judiciary.

The reform and European standards for Councils for the Judiciary

The introduction for Councils for the Judiciary has been recommended by the Council of Europe (at paras. 26-29), the Consultative Council of European Judges and the Venice Commission (at paras. 28-32). Councils for the Judiciary are supposed to safeguard the independence of the judiciary by selecting candidates for vacant judicial posts. Where such Councils have been installed, they can only fulfill this role if they meet certain standards.

To begin with, a Council for the Judiciary should either exclusively or by a substantial majority be composed of judges selected by their peers. This aims at preventing any manipulation or undue pressure from political parties. While Article 187 of the Polish Constitution fixes a substantial majority of judges on the Council (17 out of 25), the newly introduced two-section-system considerably enhances the influence of non-judicial members: no judge can be appointed who is not also backed by the political appointees of the Council.

According to European standards, judicial members of a Council should be selected by their peers or, for a limited number of members, *ex officio*. In general, the selection should guarantee a wide representation of the judiciary at all levels. The interference of political authorities or judicial hierarchies should be avoided. Impartiality and independence of its members and of the Council itself must be the guiding principles. Since a prospective member of the Council must be supported by a substantial number of *Sejm* deputies or its Presidium, the Draft Act leaves the selection of members of the Council to the *Sejm*. Also, there are no criteria to be applied for the selection of judicial candidates. It will be up to the Speaker of the *Sejm* to choose any candidate he/she deems appropriate. Further, nothing provides for an adequate representation of all levels of the judiciary.

So far, the proposed amendments raise serious doubts as to their compliance with European standards for Councils for the Judiciary. It is possible that the amendments might entail negative effects on the separation of powers and the independence of the judiciary, as they might lead to a decisive influence of politicians over the selection of judges.

These worries are supported by comments of Polish government officials: When the reform of the Constitutional Tribunal was on its way, the Venice Commission (at paras 115-119) was confronted with the theory that judges appointed while the opposition party was in power were "opposition judges". Similar comments made by Jarosław Kaczyński strengthen the perception that the government sees judges as "belonging" to the party that appointed them.

Similar tendencies have also been noted (at para 44) in other European countries (at paras. 42 – 95). This understanding of the judicial office runs contrary to what is seen as a European standard: as the Venice Commission (at paras. 118-119) has stated, judges have a "duty of ingratitude" towards the authority that selected or appointed them. They can never represent a political party. They are independent and their loyalty is to the laws and the Constitution. While Members of Parliament are elected because of their political views, this is very different from the role of judges or judicial members of a Council for the Judiciary.

Still, the Polish Government insists that their proposed system for selecting judges is by no means original and advances the German system of electing judges as a point of reference. This argument is of particular importance, as any criticism of the reform from Europe or Germany would lose its weight if it turned out that a similar system was tolerated in Germany.

The German model and the question of democratic legitimacy of judges

In Germany, no Councils for the Judiciary exist. On the German state-level *(Bundesländer),* many different systems for selecting judges are in place, but they are all heavily dominated by the political branches of government. This is also true for the selection of federal judges. We will focus on the appointment of federal judges only, as an analysis of the complicated patchwork of systems for judicial appointments in the states would exceed the limits of this post.

Federal Court judges are appointed by the "*Richterwahlausschuss*", an appointment committee composed of the competent federal minister, the competent ministers of the Länder and the same number of members selected by the Bundestag (Art. 95 (2) of the Basic Law). The federal minister remains bound by his/her constitutional duty to appoint only based on merit ("Bestenauslese" derived from Art. 33 (2) of the Basic Law); the other members, none of whom are members of the judiciary, are free in their electoral choice.

This system is no model of transparency or "depolitization". A strong political influence makes the selection process intransparent and is not in line with the necessary "depolitization" of judicial appointments. The process may be found to be particularly democratic, but it does not by itself ensure judicial appointments based on objective criteria without potential undue influence from politics as expected by European standards. According to these standards, to counter the risks of a "politization" of the judiciary, every decision relating to a judge's appointment or career should only be based on objective criteria and be either taken by an independent authority or subject to guarantees to ensure that it is not taken other than on the basis of such criteria. While Germany has not introduced a Council for the Judiciary, in fact, certain practices are in place which have so far prevented that the selection of judges has turned into a threat for the rule of law:

Firstly, the Länder have a strong influence on the selection of federal judges through the "*Richterwahlausschuss*". This ensures that no federal government and parliamentary majority can appoint federal judges only based on its own assessment. The governments of the Länder therefore ensure a certain balance of interest in the politically sensitive process of selecting federal judges.

Secondly, there is effective judicial control concerning judicial appointments. Decisions on the appointment of judges

by the minister of justice can be challenged in Court. Recently, the FCC (at paras. 27 – 35) has clarified its position on some of the criteria applicable to the review of the selection process. Most notably, the *"Richterwahlausschuss"* is under an obligation to select a candidate who can be appointed by the competent minister without forcing him/her to violate his/her duty to appoint only based on merit. Further, the minister can refuse the appointment of a selected candidate if he/she is manifestly ill-suited for the position. If the minister decides to appoint a selected candidate, even though the professional evaluation found them not to be suitable for the position, the minister has an obligation to state his/her reasons. Many more criteria have been developed through an abundance of lawsuits brought by competitors for judicial posts. This judicial control aims at preventing appointments that are clearly politically motivated and has already proven to intervene effectively.

Thirdly, there can be found what could be called a " *culture of independence*". Political actors tend to be aware that they are choosing independent judges who only answer to the laws and the Constitution. Apart from some misguided comments about the "political loyalty" of *Justice Huber* of the FCC, there is relatively little political criticism aimed at judges that would amount to disrespect or undue pressure against the judiciary. This contrasts the outspoken hostilities of Polish government officials against their judiciary already mentioned above. The public discussion about the suitability of former politician *Peter Müller* for an appointment to the FCC shows that the public is very much aware of the necessity to appoint judges only based on merit. In any case, the Justices of the FCC have shown that they are not bothered by political restraints. There are no sound reports that any German judges have acted under pressure of political parties or other authorities.

These practices result in a functional selection of judges that in itself is not contrary to the basic principles of European standards. However, they do not guarantee that adverse effects on the rule of law can be avoided if the tides turn politically.

The potentially problematic influence of the executive has its roots in Article 20 (2) of the Basic Law which – similarly to Article 4 of the Polish Constitution – states that all state authority is derived from the people. It must be possible to trace back any exercise of state power to the act of a democratic vote through a continuous chain of democratic legitimacy. This requirement is met by both the selection of judges by a *"Richterwahlausschuss"* or solely by the minister of justice. It is precisely this alleged need for a stronger democratic legitimacy of judges that is advanced by the Polish government in favor of their reform.

While it is not all clear that additional democratic legitimacy for judges in the form of political responsibility of the political actors involved can be derived from the selection by a *"Richterwahlausschuss"*, it could, on a broader level, be worth reflecting on the question of what kind of legitimacy really is necessary for the judicial office. In the light of recent political events, it might be worth reconsidering if democratic legitimacy of judges can remain a priority when basic safeguards of the rule of law are being questioned. The "democratization" of the appointment process of judges bears the risk of a "politization" which can jeopardize the independence and impartiality of the judiciary. These principles are of such vital importance for the rule of law and therefore also for a functioning, modern constitutional democracy itself that they should enjoy the highest priority when it comes to choosing judges and the persons that select them.

It is true that judges are partly legitimized by an appointment in accordance with the laws and the Constitution. This so-called *"formal legitimacy"* aims at the procedure of their appointment and is a possibility to satisfy the requirements of Article 20 (2) of the Basic Law and Article 4 of the Polish Constitution respectively. Democratic legitimacy of judges is further enhanced by the fact that they usually apply laws that have been passed by a democratically elected parliament. However, the primary source of judicial legitimacy, as the CCJE (at paras. 17-19) has stated before, is the highest possible quality of a judge's work. This so-called *"functional legitimacy"* describes the public trust in a hard working, well-functioning, ethically and morally stable and highly competent judiciary. This form of legitimacy ensures the necessary independence of judges and effectively guarantees the acceptance of judicial decisions. It is not the task of judges to decide cases in the way the current political majority would like them to decide. A functioning judicial system that is to serve the rule of law cannot depend on what the majority –

however democratically legitimate it may be, – wants. A judge's decision can, and sometimes must be, unpopular. Therefore, the quality of judicial work and the public trust the judiciary gains through this work is a better foundation for the exercise of state power by judges than the mere focus on their democratic legitimacy.

Against this theoretical background, the events in Poland should be reason enough for Germany to critically assess its model of judicial appointments in the light of European standards. As for Poland, the government's reference to Germany for the Draft Act is not entirely misguided. However, it remains unclear if the necessary guarantees and safeguards are in place in Poland to ensure that judges are only chosen based on objective criteria. Also, it should be noted that the German system has not been set up by a new political majority in order to shape the judiciary to its liking as it seems to be the case in Poland.

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